No. 25.
Petition for Rehearing.
25

IN THE

Supreme Court of the United States.

FROM THE SUPREME COURT OF TENNESSEE.

WILLIAM B. AUSTIN

v.

STATE OF TENNESSEE.

Petition for Rehearing and Certificate of Counsel.

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IN THE

Supreme Court of the United States.

No. 25.—October Term, 1900.

WILLIAM B. AUSTIN,
Plaintiff in Error,

vs.

THE STATE OF TENNESSEE.

WRIT OF ERROR FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

Petition for Rehearing by Plaintiff in Error, William B. Austin, Above Named.

William B. Austin, the plaintiff in error in the above-entitled cause, respectfully presents his petition for rehearing, and submits the following reasons why his prayer should be granted:

1. The question involved in this case is a Constitutional question of extreme importance and interest. It involves the line of demarcation between the power of the Federal Government under the commerce clause of the United States Constitution and the police power of the State. This Court holds, without dissent, that cigarettes, the product whose sale is involved, are com-

mercial articles, and without dissent has overruled the Supreme Court of Tennessee in its ruling in this respect. By a divided Court, however, it is held that because of the smallness of the package, and the imputed purpose of the shipper to avoid the effect of the prohibitory statute, the package sold in this case was not an "original package" of import, so as to be, under the commerce clause of the Federal Constitution, exempt from the operation of State Laws.

The principle involved in numerous decisions of this Court from Brown *v.* Maryland, to Schollenberger *v.* Pennsylvania, seems to your petitioner to be seriously affected by the present decision.

The learned Justices who heard the oral argument being equally divided on this last question, your petitioner has been unfortunate in that Mr. Justice White was unable, through indisposition, to be present thereat. Inasmuch as his opinion rests largely upon what are supposed to be the special facts of the case, the misfortune of your petitioner in this particular is especially great.

The printed brief of the plaintiff in error was prepared and signed before Mr. John G. Johnson, who was retained in the case, and the argument which he made orally does not therefore appear, and is not embodied, in the said printed brief.

The case involves matters not only important to your petitioner, but immensely important as well to the public and to commerce. The principles involved are such that the authoritative, definite and conclusive disposition of the same are matters of intense interest, such as justify your petitioner, he thinks, in asking that every possible aid in the submission of the same to this Court shall be

given (Briscoe *v.* Bank, 8 Peters, 118; City of New York *v.* Milan, 8 Peters, 120; Insurance Company *v.* New York, 119 U. S., 129; Phillips' Practice, p. 380).

2. This Court, in the opinion which has prevailed, has, through the failure of your petitioner to call its attention to the fact that cigarettes are commonly sold in the identical package in which the sale in the case at bar was made, not been informed as to the usual manner of such selling. It is true that the Internal Revenue laws permit the packing of cigarettes into packages of 20, 50 and 100, as well as into packages of 10, but the ordinary package of commerce is one of 10, and the records of the Internal Revenue office show that many more cigarettes are shipped and sold in packages of 10 than in all other sizes combined.

3. This Court, through the fault of petitioner, disregards the fact that different manufacturers have different methods of distribution of their goods, so that the phrases "the usual method of shipment" and "the *bona fide* shipments," contained in the majority opinion, will induce very singular and unlooked for results. It is a fact that some manufacturers of cigarettes ship only to wholesalers, and in large quantities; some ship only to wholesalers and large retailers, and in smaller quantities; some ship to small retailers as well, and in still smaller quantities; and some ship to all these and to consumers, and in the small internal revenue packages. Therefore, under existing conditions and the opinion of the majority of this Court, an importer might sell two exactly similar packages of cigarettes, and one sale might be unlawful and the other lawful, because he had received the first from A, whose usual package of shipment was larger than this, and the second from B, whose usual package of shipment was not larger.

4. Petitioner respectfully submits that, perhaps through his own dereliction in the presentation of his case, great future embarrassment will result to the Court and to commerce from this decision, taking into consideration the previous opinions of this Court. Heretofore it has been uniformly held that the intent even of a State Legislature was not to be considered in enforcing and construing the grants of, or limitations on, powers contained in the Federal Constitution (Minnesota *v.* Barber, 136 U. S., 313; Mugler *v.* Kansas, 123 U. S., 623; Soon Hing *v.* Crowley, 103 U. S., 703). In this case, however, the intent even of the shipper is permitted to be controlling in determining petitioner's guilt, for petitioner assumes that the smallness of the package was considered and discussed by the Court only because it bore on and was evidence of the purpose of the shipper to avoid the prohibitory statute—the size of the package, *per se*, could not be material, for Congress, of course, has it powers, and citizens their rights, without reference to the size or value of the matter involved. It is evident, of course, that the shipper in this case supposed that the consignee, your petitioner, would sell the package of cigarettes shipped to him, and sell it nothwithstanding the State prohibitory statute. But this would have been just as certainly true, whatever had been the size of the package, and however the method of shipment had conformed to that usual with the shipper. This was unquestionably the expectation of the shipper in Leisy *v.* Hardin, Schollenberger's case, Bowman *v.* Railroad, and all the other cases in which this Court has, nevertheless, asserted the exemption of such original package from the operation of State laws, and that the sale is a necessary part of commerce. Therefore, if this expectation of the *shipper* is

to be considered an intent, and so to deprive the *consignee* of what, in its absence, would be his constitutional right, the constitutional right becomes of small practical value, and the power reserved to Congress becomes of small practical importance. If the intent of the shipper could be considered, it is not in this case an intent to "evade" a State statute, but rather to assert and rely on the protection of the Federal Constitution—the supreme law of the land. If intent was to be considered, have we not, in the Tennessee statute, evidence of an intent to evade - or rather to ignore—the Constitution of the United States?

5. Finally, petitioner contends that it is the *import*, in the hand of the original importer, that, under the previous decisions of this Court, is exempt from the operation of State laws, without reference to the form or value of such import; that the Constitution of the United States operates on *things* and *conditions*, and not on *persons* or *motives;* that the purposes or intent of the *shipper* or *common carrier* can be of no consequence in a case involving the guilt or innocence of the *consignee;* that the term "original package" properly involves no consideration of good or of bad faith, usual methods or unusual methods, or any other personal question, but that it is merely a suggested line of demarcation between an "import" properly so-called, and the "common mass of property of the State."

Your petitioner, therefore, respectfully prays that this case be restored to the docket and a reargument be ordered as to the questions upon which the Court was divided in opinion.

JOHN G. JOHNSON,
W. W. FULLER,
JUNIUS PARKER,
Attorneys for Petitioner,
Wm. B. Austin.

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WRIT OF ERROR FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

The undersigned, members of the Bar of this Honorable Court, humbly conceived that it is proper that the writ of error in the above-entitled cause should be reheard by this Court, if this Court shall see fit so to order, and they, therefore, respectfully certify accordingly.

JOHN G. JOHNSON,
W. W. FULLER,
JUNIUS PARKER.